IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.513 of 2001.
Reserved on: May 14, 2007.
Decided on: June 11, 2007

Bakshi Lal **…..Appellant.**

VERSUS

Dina Nath & Ors. **…..Respondents.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Mr.K.D.Sood, Advocate.**

For Respondent No.1: **Mr.G.D.Verma, Sr.Advocate with Mr.Romesh Verma, Advocate.**

Kuldip Singh, Judge

The plaintiff is in appeal against the judgment and decree dated 12.9.2001 passed by learned District Judge, Hamirpur in Civil Appeal No.27 of 1993 dismissing the appeal of the plaintiff. The parties are referred in the same manner as in the trial Court.

2. The facts, in brief, are that the plaintiff filed a suit for declaration and for permanent prohibitory injunction restraining the defendants from interfering in the possession of the plaintiff on the suit land which was owned and possessed by one Shri Chuni Lal.

3. The further facts are that Chuni Lal was owner in possession of suit land and he allegedly executed a Will in favour of

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment ? Yes***

plaintiff on 23.12.1985. The plaintiff came in possession of the suit land on the basis of the Will. Defendant No.1 filed one civil suit in the Court of Sub Judge (2), Hamirpur for possession of 1/5th share of the suit land which was dismissed on 26.6.1987 as withdrawn. Defdndant No.1 in January 1988 attempted to forcibly occupy the suit land. The plaintiff is sole owner in possession of the suit land and defendants have no right whatsoever therein, hence, plaintiff filed the suit.

4. The defendants No.1 and 2 have contested the suit by filing written statement. They have alleged that the suit is not maintainable. The plaint does not disclose cause of action. The execution of Will by Chuni Lal, as alleged by the plaintiff, has been denied. The Will has been forged and concocted after the death of Chuni Lal. The Will is not binding on the defendants in view of custom governing the parties who are *Rajputs* and governed by custom in the matters of alienation of ancestral property.

5. The trial Court has held that Will dated 23.12.1985 was not executed by Chuni Lal and dismissed the suit on 6.1.1993. The plaintiff filed appeal which has also been dismissed by learned District Judge on 12.9.2001. The plaintiff is in second appeal in this Court.

6. The appeal has been admitted on the following substantial questions of law:-

(i) Whether the findings of the Courts below are based on misreading and misconstruction of oral and documentary

evidence, particularly the Will, Ext.P-1, the basic document of title and the findings are perverse and not supportable from the evidence on record?

(ii) Whether in view of the settled possession of the plaintiff and the fact that he was the co-owner of the property was entitled to a decree of injunction and the suit of the plaintiff has been wrongly dismissed?

7. I have heard the learned counsel for the parties and have also gone through the record.

Substantial Question No.1:

8. PW-2 Onkar Thakur, Advocate has stated that the Will Ext.P-1 dated 23.12.1985 was scribed by him at the instance of Chuni Lal. Chuni Lal signed the Will. Marginal witnesses were present who also signed and thumb marked the Will. This witness has not stated that the Will Ext.P-1 was signed by him. In cross examination, he has stated that Hoshiar Singh, Pradhan, Lashkari Ram, one girl and a woman were also present.

9. PW-3 Kaula Devi has stated that Chuni Lal had executed Will in favour of Bakshi Ram and on that date he had come from Hospital. The Will Ext.P-1 was scribed by Onkar, Advocate. The Will was signed by Chuni Lal. Shri Lashkri Ram, Hoshiar Singh and Sheela signed and thumb marked the Will. She has not stated that

Chuni Lal signed Will Ext.P-1 in the presence of marginal witnesses. She has not stated scribe read over the Will to Chuni Lal.

10. PW-4 Sheela Devi, daughter of Chuni Lal, has stated that Will Ext.P-1 bears her signatures. She has not stated that Chuni Lal signed Ext.P-1 in her presence. She has stated that marginal witnesses of the Will were present who were her mother Kaula Devi, herself, Lashkari Ram and Hoshiar Singh, Pradhan. She has stated that Hoshiar Singh signed after putting the seal of Pradhan and endorsement Ext.P-1/A was made by Hoshiar Singh in her presence.

11. PW-5 Hoshiar Singh has stated that endorsement Ext.P-1/A on the Will was made by him which was done in good faith. The endorsement Ext.P-1/A was made at the instance of Bakshi Ram, Chuni Lal was not present at that time. Chuni Lal and Sheela did not put their signatures in his presence. On 4.1.1986 Bakshi Ram brought Will which was already written and signed. He was not aware that on 4.1.1986 father of Bakshi Ram had already died. He has admitted affidavit Ext.DA. In Ext.DA Hoshiar Singh has stated that Bakshi Ram called him at village Dohak on 4.1.1984 in the house of Smt.Vidhya Devi real sister of Bakshi Ram. On that date Bakshi Ram stated that his father Chuni Lal had executed a Will in his favour and he was not in a position to come to the house of Smt.Vidhya Devi or go to Sub Registrar, Bhoranj. Bakshi Ram at that time had not told that his father Chuni Lal had died on 24.12.1985. He attested the Will dated

23.12.1985 in good faith presuming Chuni Lal was alive on 4.1.1986. No Will was executed in his presence nor Chuni Lal was present at the time of witnessing and attestation on 4.1.1986.

12. The Will is to be executed as provided in Section 63 of the Indian Succession Act. The propounder of the Will is to prove the execution of the Will. The suspicious circumstances are required to be explained by the propounder. In ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma & Ors., AIR 1959 SC 443,*** the Hon'ble Supreme Court in Para-19 has held as follows:-

> "... … Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the depositions and put his signature to the document of his own free will."

13. The Will Ext.P-1 was allegedly executed when the testator was not keeping good health. It is the case of the plaintiff that on the date of execution of the Will the testator was brought in the Hospital and from Hospital the testator came to the Tehsil compound where the Will was allegedly executed. PW-2 Onkar Thakur, Advocate claims that the Will Ext.P-1 was executed by him but in his testimony he nowhere says that the Will was signed by him in token of his having scribed the Will nor he has explained why he has not signed the Will even though it was prepared by him. This circumstance creates a suspicion and this has not been explained either by the propounder or by alleged scribe himself. PW-3 Kaula Devi has not stated that the Will Ext.P-1 was signed by Chuni Lal in her presence nor she has stated that Chuni Lal acknowledged the execution of Will to her or other marginal witnesses. Similar is the statement of PW-4 Sheela Devi which is short of requirement of Section 63 of the Indian Succession Act regarding execution of the Will. It is the common stand of plaintiff, PW-3 Kaula Devi, PW-4 Sheela Devi that at the time of execution of the Will Hoshiar Singh, Pradhan was also present. Hoshiar Singh has appeared as PW-5 and he has stated that endorsement Ext.P-1/A on the Will was made by him at the instance of Bakshi Ram and at that time Chuni Lal was not present. In fact, PW-5 Hoshiar Singh has completely demolished the case of plaintiff regarding the execution of Will by Chuni Lal. PW-5

Hoshiar Singh has admitted execution of affidavit Ext.DA wherein he has stated that no Will was written or scribed in his presence by Chuni Lal. Bakshi Ram came to him on 4.1.1986 and he attested the Will on 4.1.1986 in good faith at the instance of Bakshi Ram without knowing that Chuni Lal had already died on 24.12.1985. The statement of PW-5 Hoshiar Singh and his affidavit Ext.DA are enough to disbelieve execution of Will Ext.P-1.

14. The learned counsel for the plaintiff has submitted that a plea of fraud has been set up in order to discredit the Will, therefore, it is on the defendants to prove the fraud and in absence of proof of fraud the Will Ext.P-1 is to be taken as validly executed. He has further submitted that depriving some of the heirs from the estate of testator is not a suspicious circumstance. In fact, the purpose of the Will is to deviate the normal succession.

15. In ***H. Venkatachala Iyengar's case (supra),*** the Hon'ble Supreme Court in Para-20 has further held as follows:-

> ".. … It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

Therefore, the above submissions made by the learned counsel for the plaintiff are of no significance in the facts and circumstances of the present case as the plaintiff has failed to prove the execution of the Will Ext.P-1 and he has miserably failed to discharge the onus of execution of the Will. The two Courts below have concurrently held against the execution of the Will Ext.P-1. The re-appreciation of the evidence is not permissible in second appeal. The substantial question of law No.1 is decided against the plaintiff.

Substantial Question No.2:

16. The plaintiff in the plaint has pleaded that defendant No.1 earlier instituted suit No.46 of 1987 against the plaintiff in which validity of the Will was also questioned. This suit was dismissed as withdrawn on 26.6.1987. A certified copy of the order dated 26.6.1987 in case No.46 of 1987 is on the record of the trial Court file. The learned Senior Sub Judge, Hamirpur dismissed the suit filed by Dina Nath for want of prosecution in view of the statement of his counsel, but the statement of the counsel has not been placed on record. The present suit has not been filed by Dina Nath. It has been filed by plaintiff Bakshi Ram. The earlier suit was not adjudicated on merits. Defendant Dina Nath has every right to defend the suit. The simple dismissal of the suit for want of prosecution is not a bar to the defendant to defend the suit on merits. It is not the case of the plaintiff that the earlier suit was decided on merits in which the controversy

involved in the present suit was also decided. The plea of *res judicata* has not been rightly taken by the plaintiff in the present case. The plaintiff has failed to point out how the findings of the two Courts below are based upon misreading of the oral and documentary evidence on record. The substantial question of law No.2 is, thus, answered against the plaintiff.

17. No other point was urged.

18. The result of above discussion is that the appeal is dismissed, the impugned judgment and decree are upheld with no order as to costs.

June 11, 2007 ***(Kuldip Singh)***
(soni) ***Judge***